Now I am inclined to agree with Mr. Conaghan that the wording of this item 189 gives the Registrar no discretion in the matter of the attendance fees which it prescribes, and that so long as a Solicitor has appeared and taken any part in the argument or proceedings, he is entitled thereunder to the full amount of the prescribed fee whether his actual attendance in Court amounts to a full day's sitting or only a few brief moments.

On the other hand I find that the members of the Bar who practise in Penang have recognised the unwisdom and inexpediency of insisting on the strict letter of the law in regard to these attendance fees, and have come to a working arrangement with the Registrar whereby the $200/- higher scale fee is to be regarded as the reward of four hours work in Court, and shorter periods are to receive proportionately smaller rewards.

In this particular case Mr. Conaghan was in Court for a period of 1 hour and 40 minutes, for which the Registrar allowed him $80/- only instead of the $100/- claimed. Mr. Conaghan's real grievance is that when he was able to get away from Court, less than 20 minutes remained before our inability to exist without food required him to partake of tiffin. He therefore considers that he should have been allowed a full half day's fee on the agreed proportionate scale, because no solicitor can be expected to devote himself to business in so short a period between the successful conclusion of his labours in Court and the commencement of his tiffin.

Here once again I find myself in sympathy with Mr. Conaghan, because the law is an exacting and exhausting profession, and few of us are able to put in any useful thinking in an odd quarter of an hour or so between two important engagements. But why should I interfere with a beneficent discretion which the local Bar have conferred upon the Registrar, and which he has exercised reasonably and with due regard to the actual time Mr. Conaghan spent in Court? It is idle to pretend that any question of principle is at stake and I am certainly not going to ignore or attempt to set aside the very desirable working arrangement which has been established at Penang in regard to these attendance fees. For these reasons I must delcine to interfere with the Registrar's reduction of Mr. Conaghan's attendance fee from $100/- to $80/-.

This concludes a lengthy judgment, and it only remains for me to place on record this fact:—that Mr. Conaghan and all the other Solicitors and advocates concerned in this case have waived their claim to fees for the long morning they spend with me in Chambers over this appeal.

Order accordingly.

Solicitor for plaintiff—*E. Isaac.*

Solicitors for first defendant—*Raghavan & Co.*

Solicitors for Official Assignee—*Wreford & Thornton.*

Solicitor for M. Marican bin Meeran Hussain—*M. A. K. Cassim.*

[ORIGINAL CIVIL JURISDICTION]

AITKEN, J.

November 13, 1939.

K.S.R.M. VEERAPPA CHETTIAR & ANOTHER

v.

A.T.K.P.L.S.P. SUPRAMANIAN CHETTIAR.

[PENANG SUIT No. 131 of 1939]

Limitation Ordinance, art. 96—Action upon a foreign judgment.

In proceedings in Rangoon the plaintiff firm were sued by the defendants and judgment was given against the plaintiffs for Rs. 30,881/15/3 together with interest and costs. The plaintiff firm appealed against that decree but were unable to obtain a stay of execution and as the result of such execution the defendant obtained Rs. 20,000 from the plaintiff firm. On the 2nd December 1931 when the case came before the Appellate Court in Rangoon the appeal was allowed and the judgment reversed. The Appellate Court however was not able to give relief by way of restitution and the plaintiff firm thereafter had to apply to the Court of first instance itself for an order to give effect to the relief to which the plaintiff firm were entitled under the decree of the appellate division. The date of the judgment of the Court of Appeal was 11th May 1933. The Court of first instance made an order directing restitution of Rs. 22,690 with interest and costs, the date of such decree being 10th July 1933. On 7th July 1939 this action was commenced in Penang.

Held, that as the judgment of the Court of Appeal gave no positive relief to the plaintiff firm the plaintiff firm were correct in suing upon the restitution decree of the 10th July 1933 rather than upon the judgment of the Appeal Court in Rangoon and that accordingly the suit was not barred by limitation.

Case referred to:

(1) *Maung Hea v. Mo Huaw Dank*, 1930 A.I.R. (Rangoon), 241.

TRIAL OF ACTION.

N. Raghavan for plaintiffs.

R. D. Hume for defendant.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Aitken, J.—This is an action upon a foreign judgment, that is, a judgment of the High Court of Judicature at Rangoon in Burmah. The defendant does not dispute that the amount claimed, and interest on a part thereof at the rate mentioned in the specially endorsed writ, is due from him to the plaintiffs under a judgment of the High Court of Judicature at Rangoon, Burmah; but he has pleaded that the plaintiff's claim to sue here on that judgment is barred by the provisions of our Limitation Ordinance.

In order that the point of law raised by the defence may be elucidated, it is necessary to give a brief resume of the judicial proceedings at Rangoon out of which the plaintiffs' claim against the defendant for Rs. 33,716, and interest on Rs. 20,000 at the rate of 9 per centum per annum from the 6th of July, 1939, until judgment or satisfaction, arises. In the writ of summons herein, which is dated the 7th of July 1939, the equivalent of Rs. 39,716 is stated to be $21,509.41.

As the plaintiffs are suing here as the partners of the K.S.R.M. firm, and as the defendant is the sole proprietor of the A.T.K.P.L.S.P. firm, I think it will be convenient to refer to these litigants by their firm letters throughout this judgment. By doing so I shall avoid any possible confusion due to the fact that whereas the A.T.K.P.L.S.P. firm was the plaintiff in Rangoon litigation, it is the defendant here. So far as I can understand the position the litigation has, from its inception in 1929, been a litigation between these two Chettiar money-lending firms as such.

On the 4th December, 1929, the A.T.K.P.L.S.P. firm commenced an action in the High Court of Judicature at Rangoon against the K.S.R.M. firm and two other defendants, claiming a decree for Rs. 26,289/6/- and certain interest thereon against the K.S.R.M. firm or, in the alternative, against the second or third defendant, or such one or other of the three defendants as the Court should find liable for the amount in suit.

On the 27th of July, 1931, judgment in this action was given against the K.S.R.M. firm and the third defendant in the decretal sum of Rs. 30,881/15/3, which was to bear interest at the rate of 9 per centum per annum until payment or realisation, together with the costs of the action.

The K.S.R.M. firm appealed against the decree pronounced against them by this judgment, but were apparently unable to obtain a stay of execution thereon. Thus, as a result of proceedings by way of such execution the A.T.K.P.L.S.P. firm obtained Rs. 20,000 from the K.S.R.M. firm on the 2nd of December, 1931.

On the 11th of May, 1933, the Court of Civil First Appeal at Rangoon gave judgment allowing the K.S.R.M. firm's appeal against the Rangoon High Court decree of the 27th of July, 1931. The formal decree drawn up to give effect to that judgment on appeal set aside the decree of the 27th of July, 1931, so far as the K.S.R.M. was concerned, and dismissed the action as against them. The A.T.K.P.L.S.P. firm were also ordered to pay a certain sum of money to the K.S.R.M. firm by way of costs.

There has been no appeal against this judgment of the Court of Civil First Appeal at Rangoon of the 11th of May, 1933, and it must be regarded as having finally disposed of the A.T.K.P.L.S.P. firm's claim against the K.S.R.M. firm as pleaded in the action which was commenced on the 4th of December 1929. It seems to follow, therefore, that from the date of this judgment the K.S.R.M. firm, as the successful appellants, became entitled, *ex debito justitiae,* to be restored to the position which they occupied before they were compelled to pay the Rs. 20,000 to the A.T.K.P.L.S.P. firm on the 2nd of December, 1931. Moreover, a litigant whose money has been improperly taken from him cannot be restored to his former position unless that money is repaid to him in full, and with interest thereon for the period during which he has been deprived of it.

I do not think that any one would question the simple principles enunciated, but in India and Burmah the appellate divisions of the High Courts are not able to give relief by way of restitution when they vary or reverse a decree of the Court of first instance. In every such case the successful appellant has to apply to the Court of first instance itself, under s. 144 of the Indian Civil Procedure Code of 1908, for an order to give effect to the relief to which he is entitled under the decree of the appellate division. Thus, on the 30th of May, 1933, the K.S.R.M. firm filed an application in the High Court of Judicature at Rangoon praying that the A.T.K.P.L.S.P. firm should be ordered to pay them Rs. 22,690, being the principal sum of Rs. 20,000 with interest thereon at 9 per centum per annum from the 2nd of December 1931 to the 30th of May 1933, by way of restitution. This application came before the then Chief Justice of the Rangoon High Court on the 10th of July, 1933, and he ordered the A.T.K.P.L.S.P. firm to pay

to the K.S.R.M. firm the said sum of Rs. 22,690, and interest on the principal sum of Rs. 20,000 at 9 per centum per annum from the 31st of May, 1933, till payment or realisation.

Two dates must be borne in mind, namely, the 11th of May, 1933, when the Court of Civil First Appeal gave its judgment in favour of the K.S.R.M. firm, and the 10th of July, 1933, when the K.S.R.M. firm obtained its decree for restitution consequential on that judgment. A third important date is the 7th of July, 1939, upon which day this action was commenced here in Penang. It is to be observed that this action was commenced within six years of the date of the restitution decree, but after more than six years from the date of the judgment of the Court of Civil First Appeal at Rangoon.

The combined effect of s. 3 of our Limitation Ordinance, and of art. 96 in the schedule thereto, is that an action upon a foreign judgment must be commenced within a period of six years from the date of such judgment. Section 11 of the same ordinance provides that in computing any period of limitation, the day from which such period is to be reckoned shall be excluded. It follows, therefore, that if this action must be regarded as an action upon the Rangoon Court of First Appeal judgment of the 11th of May, 1933, it is out of time and must be dismissed. But if it is, as pleaded in the specially endorsed writ of summons, an action on the restitution decree of the 10th of July, 1933, then it was commenced just in time and the K.S.R.M. firm is entitled to judgment against the A.T.K.P.L.S.P. firm in accordance with their claim.

I think it is now possible to state the point of law raised by the defence very briefly thus:— must the Court here regard the restitution decree of the 10th of July, 1933, as merely an order by way of execution of the Appeal Court's decree of the 11th of May, 1933, and therefore as relating back to that decree, or must the restitution decree be regarded as a separate and distinct decree which can itself be enforced by execution.

This question seems to have been debated on many occasions during the last 30 years or so in the Indian Courts, and such debates have produced a surprisingly large crop of diverse opinions. Not only has Province differed from Province, but even in the same High Court Judges have from time to time expressed different views. In the case of the Patna High Court the divergence of judicial opinion reached such a pitch that in 1934 the Full Bench of that High Court, by a majority of three to two, overruled its own decision of 1925 when the majority was two to one. The 1934 majority was in favour of the view that a restitution decree made under s. 144 of the Indian Civil Procedure Code of 1908 is a mere execution order, and presumably that view will prevail in Patna unless and until another Full Bench overrules the 1934 decision and restores that of 1925. But owing to the scarcity of Indian Reports available for consultation here in Penang, I am not in a position to say how far this 1934 decision of the Patna High Court is in accordance with the latest decisions of the Courts of Madras, Calcutta, Bombay, Oudh, Allahabad, Lahore and Rangoon on the same point; and in 1930 the High Court of Rangoon in *Maung Hea v. Mo Huaw Dank*[1] appears to have adopted the opposite view in reliance on the 1925 Patna decision, and may still be of the same opinion. Quite apart from these difficulties it seems to me that other considerations must be weighed when a restitution decree made under s. 144 of the Indian Civil Procedure Code of 1908 is sued upon as a foreign judgment in the High Court of these Settlements. Our practice and procedure are very different to those of the Indian Courts.

The lengthy arguments addressed to me by learned counsel on both sides may be summarised as follows:—

For the K.S.R.M. firm Mr. Raghavan contended—

(1) that the Appeal Court at Rangoon cannot give relief by way of restitution;

(2) that the restitution decree of the 10th of July, 1933, is expressly declared to be a decree by s. 2, sub-s. 2 of the Indian Civil Procedure Code of 1908;

(3) that it is a decree of the Court of first instance whereas the decree of the 11th of May, 1933, is a decree of the Court of Civil First Appeal;

(4) that the restitution decree of the 10th of July, 1933, is itself capable of being executed as appears by the Order of the High Court of Rangoon, dated the 12th of June, 1936, which gave the K.S.R.M. firm leave to execute it against A.T.K.P.L.S.P. Supramanian Chettiar as the sole proprietor of the A.T.K.P.L.S.P. firm; and

(5) that the restitution decree of the 10th of July, 1933, must be the decree upon which this action is brought because, according to English practice, no action can be brought upon a foreign judgment unless that judgment is for a definite or ascertained sum of money.

For the A.T.K.P.L.S.P. firm Mr. Hume contended—

(1) that the obligation on the A.T.K.P.L.S.P. firm to make restitution arose under the Rangoon Appeal Court's decree of the 11th of May, 1933, which not only set aside the judgment in the

Court below but also dismissed the claim of the A.T.K.P.L.S.P. firm against the K.S.R.M. firm;

(2) that the restitution decree of the 10th of July, 1933, which was consequential on the Appeal Court's decree of the 11th of May, 1933, was merely an order made as of course, and must therefore be regarded as relating back to the earlier decree which really determined the rights and liabilities of the parties with respect to the Rs. 20,000 obtained by the A.T.K.P.L.S.P. firm on the 2nd of December 1931;

(3) that the decree of the 10th of July, 1933, must be regarded as nothing but an order for execution of the earlier Appeal Court decree; and

(4) that where execution of a decree can only issue on obtaining an order for its execution, that order does not constitute a new judgment debt so as to make a statutory period of limitation begin to run afresh.

It will be seen from these summaries that there is much to be said for either point of view, and I cannot say that I have been able to obtain substantial degree of comfort or guidance from the numerous authorities which were cited to me by learned counsel. Unfortunately apart from the conflicting Indian decisions, there does not appear to be any decided case directly in point. It seems to me, therefore, that I must fall back upon my own resources and decide this difficult point of law upon my own view of the arguments placed before me by learned counsel. I need hardly say that I recognise the probability of other judicial minds taking a different view.

Now to my mind Mr. Raghavan's arguments should prevail, and my reasons for thinking so are as follows:—

1. The Rangoon Appeal Court decree of the 11th of May, 1933, contains no mention of any sum of money nor does it grant any specific monetary relief. Therefore no suit could be brought upon it, and it only, in these Settlements.

2. The restitution decree of the 10th of July, 1933, is undoubtedly a decree for a definite sum of money, and it is final and conclusive between the parties in regard to their rights and liabilities with respect to the Rs. 20,000 obtained by the A.T.K.P.L.S.P. firm from the K.S.R.M. firm on the 2nd of December 1931. Therefore, unless it must be regarded as relating back to the Court of Appeal Decree of the 11th of May, 1933, it affords a sound basis for this action.

3. The restitution decree of the 10th of July, 1933, is the separate decree of a different Court, and it is therefore rather difficult to see how it can relate back to the Appeal Court decree of the 11th of May, 1933, especially as the latter Court could not, and did not, make any order for restitution.

4. The Rangoon High Court has made an order giving leave to execute the restitution decree of the 10th of July, 1933, against the defendant A.T.K.P.L.S.P. Supramanian Chettiar as the sole proprietor of the A.T.K.P.L.S.P. firm. Unless there can be an execution upon an execution, so to speak, it would seem that the Rangoon High Court was treating the restitution decree as one capable in itself of being executed.

5. Broadly speaking a decree can only be executed in so far as it grants any relief, and the Rangoon Appeal Court decree of the 11th of May, 1933, only dismissed the A.T.K.P.L.S.P. firm's claim as against the K.S.R.M. firm. It granted the K.S.R.M. firm no positive relief, and there is no order in that decree, apart from the order as to costs, which is capable of execution. I am therefore inclined to think that the Court of first instance, when it made the restitution decree of the 10th of July, 1933, was not ordering execution of the Appeal Court's decree, but was passing a separate though supplementary decree which may itself be executed.

In the result I have come to the conclusion that judgment must be entered for the K.S.R.M. firm, who are the plaintiffs in this action, against the A.T.K.P.L.S.P. Supramanian Chettiar, who is the defendant, in the amount claimed with interest on the dollar equivalent of Rs. 20,000 from the 6th of July, 1939, until to-day's date. Costs must follow the event, but I do not doubt that the defendant will test the correctness of this decision in the Court of Appeal where, but for the rules, it might very well have been heard and decided in the first instance.

Order accordingly.

Solicitors for plaintiffs:—*Raghavan & Co.*

Solicitors for defendant:—*Hogan, Adams & Allan.*

[ORIGINAL CIVIL JURISDICTION]

AITKEN, J.

November 27, 1939.

S. M. ISAHAK v. REX.

[PENANG CRIMINAL APPEAL No. 16 of 1939]

Bankruptcy Ordinance, s. 107, sub-s. 1—Criminal Procedure Code, s. 124.

A statement made by a bankrupt to an Assistant Official Assignee is not analogous to a statement made to a police officer investigating a criminal offence and it is admissible in evidence against a bankrupt on any charge read against him under s. 107, sub-s. 1 of the Bankruptcy Ordinance.

Case referred to:—

(1) *Rex v. Leinster* [1924] 1 K.B. 311.

MAGISTRATE'S APPEAL.

T. E. Conaghan for appellant.

C. O. Lim for Crown Counsel for the Crown.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.